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No. 286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PETER DiFRONZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE UNTIMELY PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND PETITION FOR REHEARING.

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MOTION FOR LEAVE TO FILE UNTIMELY PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Peter DiFronzo, respectfully moves for leave to file an Untimely Petition for Rehearing of an Order of this Court denying a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit entered on October 11, 1965. This relief is sought at this time because of a subsequent decision of the United States Court of Appeals for the Seventh Circuit, entered on December 21, 1965, that permitting a jury to separate over night during its deliberations on a verdict in a criminal case is reversible error. *United States* v. *Panzcko*, 7th

Cir. 1965, 353 F.2d 676. As is explained more fully in the annexed Petition, this decision adhered to an earlier decision of that Court, *United States* v. *D'Antonio*, 7th Cir. 1965, 342 F.2d 667, which preceded the decision herein in the court below. *United States* v. *DiFronzo*, 7th Cir. 1965, 345 F.2d 383.

Although this Petition is filed after the expiration of time prescribed in Rule 58, one of the grounds upon which it is based, namely the decision in *United States* v. *Panzcko, supra,* arose after such time. Thus, the Court has the discretionary power to entertain the Petition. 28 U.S.C. 452; see, *Clark* v. *Manufacturers Trust Co.*, 337 U.S. 953, 338 U.S. 241, 242; *Cf. Sacher* v. *United States*, 342 U.S. 858.

Moreover, it is respectfully urged that the interests of justice, especially in view of the claimed deprivation of equal protection and due process effected by the conflicting opinions of the Seventh Circuit, require reconsideration of the Petition. *Cf. Grondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25.

The Petitioner began service of the sentence imposed upon him by the United States District Court for the Northern District of Illinois, Eastern Division, in November 1965. He is presently confined under that sentence and judgment at the United States Penitentiary in Leavenworth, Kansas. This Petition, therefore, could not conceivably be, and is not, filed for the purpose of delay.

Dated: May 17, 1966

CHARLES A. BELLOWS

GEORGE F. CALLAGHAN
Counsel for Petitioner

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Peter DiFronzo, prays that this Court grant a rehearing of the Order of October 11, 1965 denying his Petition for a Writ of Certiorari, and that said Writ issue to review the Order of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, as prayed in the Petition.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

(A) History of the Controversial Issue:

Prior to the decision of the United States Court of Appeals for the Seventh Circuit in *United States* v. *D'Antonio,* 7th Cir. 1965, 342 F.2d 667, no authority in the Federal Courts established that it was reversible error to permit a jury to separate overnight during its deliberations in a criminal case over the objections of the defendant. The Seventh Circuit found that a defendant, "when on trial upon a charge of the commission of a felony, [has a historical right] to have his case decided by a jury whose secret *deliberations* are not interrupted by the court's order permitting them to *separate* before a verdict had been reached." *United States* v. *D'Antonio, supra,* at 669. The court arrived at this conclusion after considering *Commonwealth* v. *Della Porta,* 324 Mass. 193, 85 N.E.2d 248 (1949), and cases cited therein. In so doing, the court either rejected or distinguished holdings in the Eighth and District of Columbia Circuits and a *nisi prius* decision in the Sixth Circuit. *Lucas* v. *United States,* 8th Cir. 1921, 275 Fed. 405; *Kleven* v. *United States,* 8th Cir. 1957, 240 F.2d 270; *McHenry* v. *United States,* D.C.Cir. 1921, 276 Fed. 761; *Wheeler* v. *United States,* D.C.Cir. 1947, 165 F.2d 225; *United States* v. *Davis,* 6th Cir. 1900, 103 Fed. 457.

Two months later, in the instant case, the Seventh Circuit rejected Petitioner's contention that the District Court had erred in permitting the jury to separate after it had commenced its deliberation on the mistaken premise that

> "* * * the trial court counsel for each of the defendfendants agreed to the procedure outlined and fol-

> lowed by the trial court in this respect. * * *"[1] *United States* v. *DiFronzo,* 7th Cir. 1965, 345 F.2d 383, 385.

The court also noted, parenthetically, that: "Moreover, there is no claim that the separation actually resulted in anything prejudicial to any of the defendants." *United States* v. *DiFronzo, supra,* at 385 n. 1.

Approximately six months after this decision, the Seventh Circuit announced its decision in *United States* v. *Panzcko,* 7th Cir. 1965, 353 F.2d 676. The court observed:

> "* * * [T]he principles which we recognized in D'Antonio had long existed and were binding on the District Court in the case now being reviewed. The facts in the record in the case at bar as to the separation of jurors at a late hour at night, leaving each to find the way to his or her respective home, merely further emphasizes the need for applying the established rule which we later reiterated in D'Antonio.
>
> "We hold that the failure by the court to sequester the jury overnight during its deliberations had a two-pronged effect, first, of exposing the released jurors to exposure to those who might, by printed or spoken word, attempt to influence their official action, and secondly, imposing upon the jurors, especially the women, unnecessary and serious inconvenience. * * *" *United States* v. *Panzcko, supra,* at 678.

Circuit Judge Duffy, concurring in the result, was dissatisfied with the criteria of inconvenience to the jurors. He felt that:

> "Consistent with our decision in United States v. D'Antonio, 342 F.2d 666, we *must* hold that it was reversible error to permit the jury in this case, over the objections of the defendant, to separate during its de-

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[1] The Solicitor General, in his Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, specifically recognized and conceded the error of this position. Brief for the United States in Opposition, p. 8. See, Point (B), *infra.*

liberations." *United States* v. *Panzcko, supra,* at 679 (concurring opinion; emphasis added).

(B) Inaccuracy of the Lower Court Ratio Decidendi:

As noted above, the Court of Appeals rejected Petitioner's assignment of error on the ground that he had agreed to the procedure followed by the trial court. But counsel for Petitioner *unequivocally* and *expressly* objected to the trial court's proposal that the jury be allowed to separate overnight. Mr. Callaghan said, in response to the pronouncement by the trial court:

> "I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, *but I would have an objection* [*to*] *the jury separating.*"

The trial court clearly understood this objection, ruling:

> "This is standard practice, Mr. Callaghan, *and I am going to do it.*" (Emphasis added)

See, Supp.App.Calzavara, p. 7; Supp.Tr., p. 7; Gov't Supp. Br., p. 5A. Furthermore, the Solicitor General has, in this Court, recognized that such objection was interposed.[2]

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[2] Although the Solicitor General did recognize that the Seventh Circuit had grossly misconstrued the Record below, he argued, in opposition to the Petition for the Writ of Certiorari, that

> " * * * implied agreement [to the proposal of the trial court to permit the jury to separate] can reasonably be inferred from the final Friday night session in which the court again outlined the procedure it intended to follow and expressly solicited objections thereto (Gov't Supp. Br. App. 6a). Mr. Callaghan objected to part of the procedure but did not *renew* his objection to separation of the jury. Nor was the objection renewed when the court instructed the jury and permitted them to proceed to their homes for the night. * * * " Brief for the United States in Opposition, pp. 8-9. (Emphasis added.)

(Brief for United States in Opposition to Petition for Writ of Certiorari, p. 8)

Despite the patency of this error by the Court of Appeals there appeared to be a possible alternative basis for accepting its decision at the time Certiorari was denied. In *D'Antonio* the trial court failed to give a cautionary instruction prior to separation and improperly permitted off-the-record conversations between a Marshal and the jury.[3] Quite clearly this was the meaning of the footnote reference in *DiFronzo* that "* * * there is no claim that the separation actually resulted in anything prejudicial to any of the defendants."

We pointed out in the Reply to the Brief for the United States in Opposition (p. 2), and we take the liberty of again pointing out, that Judge Will, before whom this case was tried, was cognizant of and rigidly followed the established rule that

> " * * * When a question has once been fairly presented to the trial court, argued and decided, * * * it is neither desirable nor seemly for counsel to continually repeat their objections. * * *" *Salt Lake City* v. *Smith,* 8th Cir. 1900, 104 Fed. 457, 470; and see, *Sanchez* v. *United States,* 8th Cir. 1961, 293 F.2d 260; *cf. Simpson* v. *United States,* 10th Cir. 1965, 346 F.2d 291, 294.

On at least one occasion during the trial the trial judge sharply rebuked counsel for renewing and restating an objection where the objection had already been fully stated. (Rec. 1187) The argument that the trial judge merely proposed during the first conference to allow the jury to separate is amply rebutted by the court's statement, following Mr. Callaghan's express objection, that

> "This is standard practice, Mr. Callaghan, *and I am going to do it.*" (Gov't Supp. Br. App. 5a; emphasis added.)

[3] The Record in D'Antonio did not indicate whether there had in fact been any communications between the marshal and the jury. The marshal was given a statement to read to the jury. The Record did not reflect whether the statement was read as given or whether any further communication took place. *United States* v. *D'Antonio, supra,* at 668.

The decision in *Panzcko,* however, completely eliminates any possible claim that a showing of actual prejudice is a prerequisite for reversal and dispels any thought that *D'Antonio* might have required it. There was no showing of actual prejudice to *Panzcko* and those matters concerning possible exposure to extraneous influences and inconvenience to jurors were present in the instant case and are present in every case. Judge Duffy's concurring opinion, as well as the majority opinion, clearly reflect that the Seventh Circuit absolutely forbids permitting a jury to separate overnight during its deliberations, over the objection of the defendant, regardless of a subsequent showing of actual prejudice.

(C) Reason for Granting the Petition:

Petitioner occupies the unique position of having had his appeal in the Seventh Circuit rejected on a false premise and having had his Petition for Certiorari rejected, in all probability, on a premise since abandoned or never intended by the Seventh Circuit. From a more practical point of view he has been denied the same relief granted his immediate successor and predecessor upon identical factual and legal grounds. From this point of view the concepts of Equal Protection and Due Process are considerably strained. "The interests of justice" would make unjust a further denial of the relief sought by Petitioner. *Cf. Grondeck* v. *Pan American World Airways, Inc.,* 382 U.S. 25.

There is another reason why the Court, even at this time, should issue its writ. While the question of allowing jurors to separate overnight during their deliberations was imperfectly presented by the *D'Antonio* decision because of the possible communication between the marshal and the jurors, no such imperfection appears since the decision in

Panzcko. There, as Judge Duffy recognized, the court accepted the principle that jurors must not be allowed to separate during their deliberations. This "intervening circumstance," the decision finally reached in *Panzcko* by the same court which denied the precise relief to Petitioner, not only has a profound effect on the footnoted reference in this case that Petitioner had not demonstrated any prejudice in the court below, but it presents a perfected issue concerning the administration of justice in the Federal Courts to be decided by this Court—*viz.* whether jurors may separate overnight during their deliberations in a criminal case, irrespective of considerations of demonstrable prejudice. Speaking plainly, if Panzcko and D'Antonio were entitled to relief, Petitioner should also be entitled to relief. Consistency, as noted by Judge Duffy, demands no less. See, *United States* v. *Panzcko, supra,* at 679 (concurring opinion):

> "*Consistent* with our decision in United States v. D'Antonio * * * we *must* hold that it was reversible error to permit the jury in this case to separate during its deliberations." (Emphasis added.)

The issue is one which is not only apt to arise in the other Circuits but it is also apt to arise in the Seventh Circuit under the present state of affairs. Thus, in the final analysis this Court should decide the issue whether separation is erroneous *per se.* Because of the reasons underlying the proscription against separation—that a defendant (and, we assume, the Government) has an historical right to have his case decided by a jury whose secret deliberations are not interrupted by the court's order permitting them to separate before a verdict has been reached —and the fact that the proscription is unquestionably intended to act as a prophylactic devise, this is the only logi-

cal decision. *Panzcko* recognized this; even *D'Antonio* did not require a showing of actual prejudice but noted instead the existence of possible prejudice. The same possibility exists in every case where the jury is enlarged during the period of its deliberations. And for this reason review by this Court would correct the manifest injustice done Petitioner by the decision below which because of a mistaken premise denied him the relief granted D'Antonio and Panzcko.

Petitioner respectfully urges that this Court grant a rehearing of its order of October 11, 1965, and that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois.

Respectfully submitted,

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CHARLES A. BELLOWS

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GEORGE F. CALLAGHAN

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